

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

PAYROLL MANAGEMENT, INC.,

Debtor.

CASE NO.: 18-30298-KKS
CHAPTER: 11

SUNZ INSURANCE COMPANY,

ADV. NO.: 19-03005-KKS

Plaintiff,

v.

PAYROLL MANAGEMENT, INC., et al.,

Defendants.

ORDER REQUIRING FURTHER BRIEFING ON *PLAINTIFF'S*
MOTION FOR SUMMARY JUDGMENT* (DOC. 74) AND *UNITED
STATE'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND UNITED STATES' CROSS MOTION FOR
***SUMMARY JUDGMENT* (DOC. 105)**

THIS MATTER is before the Court on *Plaintiff's Motion for Summary Judgment* ("Sunz Summary Judgment Motion," Doc. 74) and the *United States' Response to Plaintiff's Motion for Summary Judgment and United States' Cross-Motion for Summary Judgment* ("IRS Cross-Motion for Summary Judgment," Doc. 105). On August 26, the Court

signed an order, submitted by counsel for Plaintiff, Sunz Insurance Co. (“Sunz”), and agreed to by all parties to this Adversary Proceeding (“Agreed Order”), limiting the scope of the Sunz Summary Judgment Motion as follows:

The scope of the Summary Judgment Motion filed by Sunz Insurance Company (“Sunz”) (Doc. 74) (the “Sunz Summary Judgment Motion”) shall be limited to *the narrow legal question of the interpretation of the collateral descriptions set forth in the UCC-1 Financing Statement recorded by Sunz Insurance Company in the Florida Secured Transaction Registry on or about November 3, 2015* (a copy of which is attached to the Sunz Insurance Company Proof of Claim #39 filed in the main bankruptcy case) and the language and scope of the tax liens of the Internal Revenue Service (“IRS”) filed on or about March 7, 2017 and August 1, 2017 (Attached as Exhibit O to the Sunz Summary Judgment Motion) *to determine which should prevail as against the other in priority*, based solely on their respective language and applicable law, to lien the BP Settlement Proceeds, as defined in the Sunz Summary Judgment Motion, and shall not be deemed to seek summary judgment on any other issue in the case, either legal or factual.¹

Certain language in the Agreed Order, when compared to the parties’ written legal arguments, is confusing. Specifically, the Agreed Order

¹ *Agreed Order Granting Motion to Limit Scope of Sunz Insurance Company’s Motion for Summary Judgment (Doc. 104)*, “Agreed Order,” Doc. 111, p. 2 (emphasis added). Later, in October 2020, Sunz and the IRS filed responses to each other’s summary judgment motions. *Plaintiff’s Response to United States’ Cross-Motion for Summary Judgment* (“Sunz’ Response,” Doc. 131); *United States’ Reply in Support of its Cross-Motion for Summary Judgment* (“IRS Reply in Support,” Doc. 140).

provides that the Court should focus its attention on “the collateral descriptions set forth in the UCC-1 Financing Statement recorded by Sunz Insurance Company” The Agreed Order does not mention, nor do the parties fully address, the sufficiency of the collateral description in the underlying security agreement between Sunz and Debtor (“Security Agreement”).

In order to determine the priority of competing security interests, the Court must determine attachment as well as perfection. Here, the Court must first determine whether the collateral description in the Security Agreement sufficiently describes the fund at issue, which the parties variously refer to as the “BP Settlement Proceeds” or the “Deepwater Horizon Settlement.” Because neither Sunz nor the IRS addressed this specific issue, pursuant to Rule 56(f)(2), Fed. R. Civ. P., applicable here by Fed. R. Bankr. P. 7056, by this Order the Court provides the parties an opportunity to brief the issue.

FACTUAL BACKGROUND

For purposes of this Order, the following dates and facts are undisputed and relevant: In April 2010, an explosion on an offshore oil rig, the *Deepwater Horizon* (“Deepwater Horizon Incident”), gave rise to numerous lawsuits that were consolidated in front of the United States District Court for the Eastern District of Louisiana.² Debtor claimed to have suffered damages as a result of the Deepwater Horizon Incident, so submitted claim(s) to the Gulf Coast Claims Facility (“GCCF”). On April 19, 2012, the GCCF notified Debtor that it may qualify for compensation and issued a check to Debtor in the amount of \$743,712.16.³ In September 2012, Debtor submitted additional claim forms (collectively “Debtor’s BP Claims”).⁴ On December 21, 2012, the District Court for the Eastern District of Louisiana (“MDL Court”) approved the establishment of fund(s)

² The Court takes judicial notice of documents filed in *In re Oil Spill by the Oil Rig, “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La. 2010), which Sunz attached as Exs. A, B & D. *See* Fed. R. Evid. 201; *Bryant v. Ford*, 967 F.3d 1272, 1275 (11th Cir. 2020) (quoting Fed. R. Evid. 201(b)) (“Rule 201 of the Federal Rules of Evidence permits a court to ‘judicially notice a fact that is not subject to reasonable dispute because it’ either ‘is generally known within the trial court’s territorial jurisdiction’ or ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’”).

³ Doc. 74-2; Ex. B.

⁴ Docs. 74-5 to -6; Exs. E & F.

and method to process and pay BP Claims (“Settlement”).⁵

In September 2015, Sunz and Debtor executed the *Sunz Large Deductible Program Agreement* (“Program Agreement”) under which Sunz issued Debtor a large workers’ compensation insurance policy and agreed to finance the premiums.⁶ On October 23, 2015, Debtor and Sunz executed the Security Agreement to secure Debtor’s payment and performance under the Program Agreement.⁷ On November 3, 2015, Sunz recorded a UCC-1 Financing Statement (“UCC-1”) with the Florida Secured Transaction Registry.⁸

In February 2017, the Deepwater Horizon Claims Center (“DHCC”) made an initial offer to pay Debtor damages from the Deepwater Horizon Oil Spill, but Debtor rejected that offer.⁹

On March 7, 2017, the IRS filed a “*Notice of Federal Tax Lien*”

⁵ Docs. 74-1, 74-3 to -4; Exs. A, C, & D. The settlement apparently became final after it was affirmed on appeal in 2014. *See In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 Fed. Supp. 2d 891 (E.D. La. 2012), *aff’d sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), *cert. denied sub nom. BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 574 U.S. 1054 (2014).

⁶ Doc. 74-10, pp. 5–9; Ex. J-1.

⁷ Doc. 74-10 pp. 12–19; Ex. J-2.

⁸ Doc. 74-10 pp. 20–22; Ex. J-3. The collateral descriptions in Sunz’ UCC-1 and Security Agreement are identical.

⁹ Doc. 74, ¶ 16 (citing *Harrison Sale McCloy Chartered, et al., Proof of Claim* at 4, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. Nov. 20, 2018), Claim 42-2.

against Debtor for \$23,186,065.93 in unpaid taxes;¹⁰ on August 1, 2017, the IRS filed a second “*Notice of Federal Tax Lien*” against Debtor for another \$3,673,031.28 in unpaid taxes.¹¹

On December 19, 2017, the DHCC sent a notification to Debtor regarding Debtor’s request for reconsideration of the original offered amount and stated the net award amount would be \$1,070,330.23.¹²

Debtor filed its Chapter 11 petition on March 27, 2018.¹³

On August 16, 2018, DHCC sent a “*Notice of Payable Claim for Debtor Claimant with Open Bankruptcy*” to the U.S. Trustee.¹⁴ On October 16, 2018, Debtor requested this Court approve the settlement of its BP Claim for \$1,070,330.23;¹⁵ by order dated November 13, 2018, this Court approved the BP Settlement.¹⁶ On November 26, 2018, Debtor received a check for \$1,070,330.23 as the BP Settlement Proceeds, which it is holding pending further order of this Court.¹⁷

¹⁰ Doc. 74-15, p.1; Ex. O.

¹¹ *Id.* at 2.

¹² Doc. 74-7; Ex. G.

¹³ *Chapter 11 Voluntary Petition, Payroll Mgmt.*, No. 18-30298-KKS (Bankr. N.D. Fla. Mar. 27, 2018).

¹⁴ Doc. 74-8; Ex. H.

¹⁵ *Motion to Approve Settlement Agreement with Deepwater Horizon Claims Center, Payroll Mgmt.*, No. 18-30298-KKS (Bankr. N.D. Fla. Oct. 16, 2018), Doc. 96.

¹⁶ *Order Granting Motion to Approve Settlement Agreement with the Deepwater Horizon Claims Center, Payroll Mgmt.*, No. 18-30298-KKS (Bankr. N.D. Fla. Nov. 13, 2018), Doc. 107.

¹⁷ Doc. 74-9; Ex. I.

**LEGAL ISSUE ON WHICH THE COURT MAY BASE
A SUMMARY JUDGMENT RULING**

Sunz and the IRS claim valid, perfected priority liens on the BP Settlement Proceeds.

The IRS argues it has priority because the BP Settlement Proceeds is a commercial tort claim or general intangible, as those are defined under Florida’s Uniform Commercial Code (“UCC”).¹⁸ According to the IRS, if the BP Settlement Proceeds was a commercial tort claim, Sunz failed to obtain a security interest because it failed to describe that asset as collateral in the Security Agreement.¹⁹ The IRS further argues that even if the BP Settlement Proceeds constitutes a “general intangible,” Sunz’ security interest did not attach until November 2018 because Debtor did not have any right to payment until then.²⁰ Overall, the IRS’ legal argument is right at one point and wrong at another.

¹⁸ Doc. 105, pp. 5–13

¹⁹ *Id.* at 7–8.

²⁰ *Id.* at 8–9. IRS raises additional arguments the Court will not address at this time: 1) in the alternative, even if Sunz’ security interest attached, it did so after the federal tax liens arose in 2017, because the BP Settlement Proceeds were not “choate” until November 2018, *id.* at 13–16; and 2) Sunz’ security interest in the BP Settlement Proceeds did not attach as a general intangible until November 2018 because that is when it converted from a commercial tort claim to a general intangible, *id.* at 9.

The IRS correctly states: “If a collateral description is explicitly insufficient under F.S.A. § 679.1081, logically the description cannot meet the requirements of the Florida Uniform Commercial Code’s requirements for attachment and therefore the security interest does not attach.”²¹ But the IRS later repeats an assumption made by both parties: that Sunz used the term “general intangible” in its collateral description.²² The latter statement, made at different times by both the IRS and Sunz, is incorrect. Nowhere in the Security Agreement’s collateral description does the term “general intangible” appear.²³

Sunz first argues that as of the date it recorded its UCC-1 in 2015, the BP Settlement Proceeds were not a commercial tort claim but a “right to payment,” which is a “general intangible” as defined under Florida’s UCC.²⁴ Here, Sunz appears to argue only the UCC-1 collateral descrip-

²¹ *Id.* at 8 (citing *In re Hintze*, 525 B.R. 780, 786 (Bankr. N.D. Fla. 2015)).

²² “Even if the Court were to find that the security interest included the [BP Settlement Proceeds] in its description through [Sunz]’ use of the term ‘general intangible,’ [Sunz] still is not entitled to summary judgment.” *Id.* at 10.

²³ To make things even more confusing, the IRS refers to two different documents as “Security Agreement.” In a footnote it alleges that the Security Agreement is the “Program Agreement” but later it refers to the Security Agreement as the “Pledge and Security Agreement.” *Id.* at 1 n.1, & ¶ 28.

²⁴ Doc. 74, pp. 20–31. *See* Fla. Stat. § 679.1021(pp) (2020).

tion and not the description in the Security Agreement. Regardless, neither the Security Agreement nor the UCC-1 list “general intangibles” as collateral.²⁵ Sunz then briefly mentions in the alternative that the BP Settlement Proceeds constitute proceeds of “contract rights.”²⁶ But the only mentions of “contract” in Sunz’ Security Agreement (and UCC-1) are in the phrases “contract proposal or bidding information” and “existing contracts and policies.”²⁷ “Contract rights” is not a term defined in Florida’s UCC.

Despite the language in the Agreed Order limiting the Court’s review to the UCC-1, even Sunz appears to agree that the operative document for *attachment* purposes is the Security Agreement. In its Summary Judgment Motion Sunz alleges: “[t]he security interest is evidenced . . . by a pledge and security agreement”²⁸ Sunz also refers to the Security Agreement in paragraphs 25 and 26 of its Summary Judgment Motion. Of particular significance is Sunz’ statement that pursuant

²⁵ In its Summary Judgment Motion Sunz incorrectly alleges that “[i]n 2015, the Debtor pledged all of its assets, *including and specifically its general intangibles*,” to secure its debt to Sunz. Doc. 74, p. 2 (emphasis added).

²⁶ Doc. 131, p. 18.

²⁷ *Sunz Insurance Co. Proof of Claim* at 19, *Payroll Mgmt.*, No. 18-30298-KKS (Bankr. N.D. Fla. Oct. 29, 2018), Claim 39-1.

²⁸ Doc. 74, p. 2.

to the Security Agreement “the Debtor granted [Sunz] a security interest”²⁹ Although it remains to be seen whether, as alleged here, Debtor granted Sunz a lien on all of its assets, Sunz nonetheless acknowledges that the Security Agreement, not the UCC-1 financing statement, is what is needed for a security interest to attach.³⁰

Neither Sunz nor the IRS addresses whether the Security Agreement, as opposed to the UCC-1 specified in the Agreed Order, reasonably identifies the BP Settlement Proceeds as “general intangibles” or “contract rights.” For that reason, and pursuant to Fed. R. Bankr. P. 7056,³¹ it is

ORDERED:

1. Plaintiff Sunz has fourteen (14) days from the entry of this Order to file a brief on the issue described in this Order.
2. Defendant, Internal Revenue Service, shall have fourteen (14) days

²⁹ *Id.* ¶ 26.

³⁰ *Id.* at 19 (the “rights and duties of parties to a security agreement are governed by the Florida UCC.”) Later in its argument Sunz correctly states that its “security interest attached” in 2015 after it and Debtor signed the Security Agreement. *Id.* at 24.

³¹ Fed. R. Bankr. P. 7056. Fed. R. Civ. P. 56(f) provides, in pertinent part: “After giving notice and a reasonable time to respond, the court may . . . grant the motion on grounds not raised by a party.” *Karlson v. Red Door Homes, LLC*, 553 Fed. App’x 875, 877 (11th Cir. 2014); *Artistic Ent., Inc. v. City of Warner Robins*, 331 F.3d 1196, 1201–02 (11th Cir. 2003) (requiring additional briefing on the new issue was sufficient notice under Rule 56(f)).

from the filing of Plaintiff's brief within to submit a reply brief.

3. If Sunz and the IRS agree to additional time for briefing, they may submit a consent order; no motion for extension of time will be necessary.

DONE and ORDERED on December 8, 2020.



KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

Plaintiff's Counsel is directed to serve a copy of this Order on interested parties and file a proof of service within three (3) days of entry of this Order.